

DIVISION IV

CACR 08-149

September 3, 2008

LENAMONT D. SMITH

APPELLANT

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[NO. CR-2002-1284]

V.

HONORABLE J. MICHAEL FITZHUGH,
CIRCUIT JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

SARAH J. HEFFLEY, Judge

On December 20, 2002, appellant pled guilty to a charge of overdraft and was sentenced to three years' suspended imposition of sentence. Appellant was also ordered to pay a \$500 fine, \$150 in court costs, and \$1,249.66 in restitution at a rate of \$50 per month. On December 1, 2006, the State filed a petition to revoke or show cause, alleging that appellant had failed to pay restitution as ordered by the court. According to the petition, the current unpaid balance was \$949.66, and no payments had been made since November 6, 2003. A hearing on the matter was held on October 17, 2007, at which the court found appellant had violated the terms of his release by not paying restitution. Appellant was sentenced to three years' incarceration with another seven years suspended. Appellant now appeals and contends that the State failed to show his failure to pay was willful. We affirm.

In a revocation proceeding, the State must prove its case by a preponderance of the evidence, and on appellate review, we do not reverse the trial court's decision unless it is

clearly against the preponderance of the evidence. *Anglin v. State*, 98 Ark. App. 34, 249 S.W.3d 836 (2007). The State bears the burden of proof but need only prove that the defendant committed one violation of the conditions. *Harris v. State*, 98 Ark. App. 264, 254 S.W.3d 789 (2007). When appealing a revocation, the appellant has the burden of showing that the trial court's findings are against the preponderance of the evidence. *Shaw v. State*, 65 Ark. App. 186, 986 S.W.2d 129 (1999). Since determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial judge's superior position. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002).

On appeal, appellant argues that the State failed to show his failure to pay was willful and that his non-payment is explained by his sporadic employment since 2002 and the fact that he has five children (three of whom live with him and two of whom he supports through child support payments). However, appellant's testimony as to his employment status and financial obligations also established that appellant is a twenty-seven-year-old, able-bodied man who is capable of working, yet he has failed to hold a steady job and has not made restitution payments in several years. Appellant's only long-term employment consisted of a job at Wal-Mart from 2005 to 2006, but appellant quit that job voluntarily and also failed to make any payments even while steadily employed. While we recognize that appellant cannot be punished by imprisonment solely because of a failure to pay restitution in the absence of a determination that the failure to pay was willful, we also recognize that a defendant's failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004).

We conclude that a preponderance of the evidence supports the finding that appellant's failure to pay was willful, especially considering his lack of bona fide efforts to seek employment. And while the trial court's ruling may not include a specific finding that the failure to pay was willful, it is clear by the trial court's comment that appellant had "more than sufficient time to make payments in this matter" that the court believed appellant's non-payment was willful. We affirm.

Affirmed.

HART and BAKER, JJ., agree.